

### REMARKS

This responds to the Office Action mailed on May 30, 2008.

Claims 80-82 are amended, no additional claims are canceled, no claims are added; as a result claims 80-85 remain pending.

The amendments made herein have been to clarify the claims and to correct typographical errors and are not intended to limit the scope of equivalents to which any claim element may be entitled. The amendments to the claims have support throughout the specification, including on page 9, lines 2-8, Figures 31d-j, and in original claims 20-22. No new matter has been added as a result. Applicant respectfully requests reconsideration of the above-identified application in view of the amendments above and the remarks that follow.

### Interview Summary

Applicant thanks Examiner Arthur Corbin for the courtesy of an informal telephone interview on August 29, 2008, with Applicant's representative, Barbara J. Clark, to discuss the outstanding rejections. No agreement was reached. Ms. Clark thanks the Examiner for the courtesies extended during the interview.

### §112 Rejection of the Claims

#### Permeability Value

Claims 80-85 were rejected under 35 U.S.C. § 112, first paragraph, as lacking adequate description.

The Examiner notes that the permeability is incorrectly recited as "0.13."

Applicant has corrected the permeability value in claim 80 to recite "0.05." Applicant has further amended dependent claims 81 and 82, accordingly, to recite progressively smaller permeabilities, as intended.

Reconsideration and removal of this rejection is respectfully requested.

"Pieces"

The Examiner further states that the specification provides no support for cereal being in the form of "pieces." Applicant respectfully traverses this assertion and draws the Examiner's attention to page 9, line 2-9, of the specification, wherein it states, "Referring to Figure 31, the cereal-based material may be provided in the form of biscuits (31a), pillows (31b), shreds (31c), or puffed *pieces* (31d-g). The puffed *pieces* may be oat, corn, rice or mixtures thereof. The puffed *pieces* may be ring shaped (31d), square (31e), spherical (31f) or convex (31g). Alternatively, the puffed *pieces* may have an irregular shape, i.e. a random shape (31h) or pattern such as a figure, a vehicle (31i) or animal (31j), for example." *Emphasis added.* See also Figures 31d-j and original claims 20-22.

Applicant has also amended claim 80 to recite "puffed cereal pieces."

Reconsideration and withdrawal of this rejection is respectfully requested.

§103 Rejection of the Claims

Claims 80-82, 84 and 85 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Beer in view of Thompson et al., Francis, Maglecic, McCrosson and Ylvisaker as set forth on pages 4-8 and 17-20 of the Examiner's Answer dated November 21, 2006.

The applicable law has been detailed in the Amendment and Response entered on April 11, 2008, together with the Request for Continued Examination, and is incorporated herein by reference as if fully set forth herein.

The Examiner states that the proposed combination teaches various elements of the claims. Applicant respectfully traverses all of these assertions.

Beer does not teach or suggest the claimed invention for all the reasons stated throughout prosecution and during the appeal process, which are incorporated herein by reference as if fully set forth. Applicant reiterates that Beer does not teach or suggest any type of frangible food item, such as puffed cereal pieces, as recited in the claims. It simply defies all logic to assume that a list of similar items would also include one random dissimilar item. Specifically, Beer is directed to solving problems associated with packaging non-frangible free flowing products without significant void spacing therebetween under vacuum. All examples given in Beer are of non-frangible products which are free flowing and without significant voids therebetween, e.g.,

coffee (beans or ground), drink mix, ready-to-eat breakfast cereal, and lawn/garden chemicals. (See col. 3, lines 24-26). Therefore, when the term "ready to eat breakfast cereal" is taken in context with the like products listed above, it is clear to Applicant, as well as to those skilled in the art, that Beer intends to include only ready to eat breakfast cereals which are "like" the other products mentioned, namely non-frangible and free flowing (e.g., granola, grits, etc.). Such an interpretation is also consistent with the state of the art at the time, as those skilled in the art would appreciate. Beer is more than "silent" on frangible products as suggested throughout prosecution, Beer is devoid of any intent to package any type of frangible product and clearly does not teach or suggest vacuum-packaging of frangible products.

Applicant respectfully suggests that in the absence of Applicant's invention, neither the Examiner, nor anyone skilled in the art, nor any casual reader of Beer, would ever consider that a reasonable interpretation of the teachings of Beer would include any type of frangible product, particularly puffed cereal pieces, as recited in the claims, as amended. As such, any modification of Beer to include frangible products is done using the Applicant's invention as a roadmap.

Neither Thompson, Francis, Maglecic, McCrosson nor Ylvisaker overcomes the deficiencies of the primary reference. Furthermore, it would not have been obvious to modify the various teachings as proposed. Applicant further restates all arguments provided in the Substitute Appeal Brief filed on December 19, 2005, as if fully set forth herein. See, in particular, pages 10-15.

Applicant urges the Examiner to fully take all of these arguments under consideration and to consider that a finding of obviousness cannot be based on selecting features from the prior art and assembling them to form an article similar in appearance to a claimed design. The claimed design "must be compared with something in existence, not with something that might be brought into existence by selecting individual features from prior art and combining them," In re Borden, 90 F3d 1570, 39 USPQ2d 1524, 1526 (Fed. Cir. 1996).

Regardless, such proposed modification does not teach all of the claim elements as required. For example, the proposed combination does not teach frangible oat-based puffed cereal pieces having a shelf life and a crush resistance no less than 14.7 PSIA or wherein vacuum-sealing a reduces breakage of the frangible oat-based puffed cereal pieces contained

within the vacuum-sealed bag, and allows the package to be filled with approximately 20 to 60% more frangible oat-based puffed cereal pieces, as recited, in part, in claim 80, as amended.

Furthermore, as the Examiner has admitted that many of these various features are missing, the Office must either be relying on inherency to reach this conclusion, or the Examiner is using personal knowledge. (See Examiner's Answer on pages 21-24). If the Office relies on inherency then, as recited in MPEP § 2112, "... the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art," citing *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original). No such basis has been provided. Since, for example, no inherent reason exists within Beer for providing a vacuum package comprising a bag which "becomes sufficiently rigid when vacuum-sealed to reduce breakage of an item contained therein," as originally recited (or that vacuum-sealing a reduces breakage of the frangible oat-based puffed cereal pieces contained within the vacuum-sealed bag, as recited in claim 80, as amended), the Examiner appears to be using personal knowledge to support this assertion. The Examiner is thus again respectfully requested to submit an affidavit as required by 37 C.F.R. § 1.104(d)(2). No such affidavit has been supplied to date.

Similar affidavits are also requested for the other assertions made throughout prosecution and in the Examiner's Answer, including, but not limited to, providing a bag capable of being filled with approximately 20 to 60% more material, the unique interpretation of the term "soft" as being the equivalent of "frangible," and so forth. (See page 24 of the Examiner Answer).

With respect to dependent claims 81, 82, 84 and 85, it would not have been obvious to modify the various teachings as proposed. Regardless, such proposed modification does not teach all of the claim elements as required.

As discussed above and throughout prosecution and the appeal process, Beer does not teach all of the elements of claims 80-82, 84 and 85. As the Examiner admits in the Examiner's Answer dated November 21, 2006, Beer also fails to teach a bag that is sufficiently rigid to reduce breakage of the cereal therein. Furthermore, none of the references disclose the missing elements. Applicant therefore respectfully requests reconsideration and the withdrawal of the 35 U.S.C. § 103(a) rejection of claims 80-82, 84 and 85 and allowance of claims 80-82, 84 and 85.

Claim 83

Claim 83 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Beer in view of Thompson et al., Francis, Maglecic, McCrosson and Ylvisaker as applied to the claims above, and further in view of Miyake et al. as set forth on pages 16-17 of said Examiner's Answer.

Claim 83 depends from claim 80. Claim 83 recites additional details of the recited package in independent claim 80. None of the references describe a vacuum sealed package as recited in claim 80. Thus, the rejection should be reversed.

Applicant therefore respectfully requests reconsideration and the withdrawal of the 35 U.S.C. § 103(a) rejection of claim 83 and allowance of claim 83.

Reservation of Rights

In the interest of clarity and brevity, Applicant may not have equally addressed every assertion made in the Office Action; however, this does not constitute any admission or acquiescence. Applicant reserves all rights not exercised in connection with this response, such as the right to challenge or rebut any tacit or explicit characterization of any reference or of any of the present claims, the right to challenge or rebut any asserted factual or legal basis of any of the rejections, the right to swear behind any cited reference such as provided under 37 C.F.R. § 1.131 or otherwise, or the right to assert co-ownership of any cited reference. Applicant does not admit that any of the cited references or any other references of record are relevant to the present claims, or that they constitute prior art. To the extent that any rejection or assertion is based upon the Examiner's personal knowledge, rather than any objective evidence of record as manifested by a cited prior art reference, Applicant timely objects to such reliance on Official Notice, and reserves all rights to request that the Examiner provide a reference or affidavit in support of such assertion, as required by MPEP § 2144.03. Applicant reserves all rights to pursue any cancelled claims in a subsequent patent application claiming the benefit of priority of the present patent application, and to request rejoinder of any withdrawn claim, as required by MPEP § 821.04.

**CONCLUSION**

Applicants respectfully submit that the claims are in condition for allowance, and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicants' representative at (515) 233-3865 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

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Date November 17, 2008

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CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being filed using the USPTO's electronic filing system EFS-Web, and is addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on November <sup>17</sup>, 2008.

Zhakalazky M. Carrion

Name

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Signature